Supreme Court, U.S.
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80-1380

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

No.

DONALD SCHANBARGER,

Petitioner,

v

POLICE CHIEF OF THE VILLAGE OF MASSENA, NEW YORK, Dale Wright,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS OF THE SECOND CIRCUIT

Donald Schanbarger

Pro se

Salem, New York 12865

November 28, 1980

QUESTIONS PRESENTED

1. Whether injunctions must be issued by a federal District Court to implement rights under the 10th and or 14th amendments to the federal Constitution where there is no practial demonstrable remedy to a person so deprived of assurted rights such as to be left alone, refusal to answers questions or arrest upon grounds to be developed by police custom with impunity, when oomplaint is made by a person that has suffered denial of such rights? (In Complaint par. 26)

2. Whether failure of a federal District Court to issue injunctions against police customs of violations of the 10th and/or 14th Amendments to the U.S. Constitution for which there is no remedy, is approval of any such violations when complaint is made by a person so deprived and left

without any remedy? (In Complaint par. 26)

3. Whether the 10th & 14th amendments to the federal constitution requires police to establish that a person is a wanted person or if a person must establish to police that he is not the wanted person? (In Complaint par. 26)

4. Whether it is necessary to allege "that any action is currently being taken by the defendant with respect to the plaintiff" or "that any future action is being threatened" when the 42 USC 1983 complaint assurts violation of the 6th, 7th, 10th & 14th Amendments to the federal Constitution as a notion of state law, usage, custom, statutues & regulation, and that he and others will receive penalty for engaging in prohib-

ited conduct as a concept of their employment, alleges plaintiff was arrested, jailed and attempted prosecution against him for failure to supply identification and in June 1979 the defendant office-holder said to the plaintiff in a court proceeding he approved of the holding and charge against the plaintiff at the time, and under the like conditions the Massena Police would do the same again?

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS OF THE SECOND CIRCUIT

The petitioner Donald Schanbarger prays that a writ of certiorari issue to review the Order of the United States Court of Appeals of the Second Circuit entered in the office of its Clerk on September 18, 1980.

OPINION BELOW

U.S. District Court for the Northern District of New York, appears in the Appendix 1-6 hereto. Second Circuit Court of Appeals of the United States affirmed the District Court by order that appears in the Appendix 7-9 hereto without opinion.

JURISDICTION

The September 18, 1980 Order of the U.S. Court of Appeals of the Second Circuit affirmed the February 21, 1980 order of the U.S. District Court for Northern New York. Assurted in the complaint are Title 42 U.S.C. Sec. 1983, Title 28 U.S.C. Sec. 1345 (3&4), & the U.S. Constitution's Art. 3 Sec. 2, personal rights clause of the 10th amendment, equal protection, prohibited state conduct, & due process clauses of the

14th amendment, right to be informed of nature & cause of accusation clause of the 6th amendment, 7 right to be secure in person & effects against unreasonable searches & seizures claim of the 14th. Petition is under 28 USC Section 1254(1) filed within 90 days of Order.

QUESTIONS PRESENTED

(# 1-4 used at Court of appeals)

(# 4 used at District Court at opposition to dismissal of complaint)

1. Whether injunctions must be issued by a federal District Court to implement rights under the 10th and/or 14th amendments to the federal Constitution where there is no practial demonstrable remedy to a person so deprived of assurted rights such as to be left alone, refusal to answer questions or arrest upon grounds to be developed by police custom

with impunity, when complaint is made by a person that has suffered denial of such rights? (In Complaint par. 26)

2. Whether failure of a federal District Court to issue injunctions against police customs of violations of the 10th and/or 14th Amendments to the U.S. Constitution for which there is no remedy, is approval of any such violations when complaint is made by a person so deprived and left without any remedy? (In Complaint par. 26)

3. Whether the 10th & 14th amendments to the federal constitution requires police to establish that a person is a wanted person or if a person must establish to police that he is not the wanted person? (In Complaint par. 26)

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the plaintiff" or "that any future action is being threatened" when the 42 USC 1983 complaint assurts violation of the 6th, 7th, 10th & 14th Amendments to the federal Constitution as a notion of state law, usage, custom, statutues & regulation, and that he and others will receive penalty for engaging in prohibited conduct as a concept of their employment, alleges plaintiff was arrested, jailed and attempted prosecution against him for failure to supply identification and in June 1979 the defendant office-holder said to the plaintiff in a court proceeding he approved of the holding and charge against the plaintiff at the time, and under the like conditions the Massena Police would do the same again?

STATEMENT OF THE CASE

Plaintiff was arrested by Massena Police around 2 a.m. of October 31, 1977. He was jailed and received attempted prosecution upon the charge of obstructing government administration. He was taken to arraingment upon the charge and was not given a copy of the charge, but the charge was dismissed, and he was released around 11 a.m.

Plaintiff brought a money action for constitution violation against Massena, N.Y. and some members of the Massena Police. At the above trial (1979) it was the position of the police that the plaintiff fit the discription of an escaped mental patient and for failure to supply identification he was arrested and held upon their charge. After around one hour of his arrest the police were ad-

vised that the escaped mental patient had been found. Around one hour after his arrest the police sent out a telatype message trying to find out who he was. A copy of the telatype message and arrest card about the plaintiff were lost by the police. A open court (1979) position of the Massena police chief was that under the same events the police would engage in the same conduct again. The police chief has in the past handed out cards to his police stating that police can not require people to answer questions.

Plaintiff now brings action for injunction against the Massena police against repetitive action against him or anyone, and that the district court appoint an administrator to over see the chief of police, for which the aforsaid jury (trial) found the Massena police and

its chief did not know their actions were illegal, thus upon the federal case law that there can be no cause of action against police if they did not know their action were unconstitutional. The jury was told by the trial judge that the plaintiff did not need to answer any questions of the police.

The present complaint assurts that plaintiff has no remedy against futher illegal actions of the Massena police.

REASONS TO GRANT WRIT

1. Notwithstanding their oath of office, police, public prosecutors and judges laugh at constitutions (Peo. v McMurty, 64 Mis 2d 163) notwithstanding their oath of office and that a subject of criminal action need not answer questions (Peo. v Rutigliano, 261 NY 103

& Maranda v Arizona. 384 US 636). The trend of this court and courts in general to support assorted gamemenship that can only result in procedure to incourage and permit police as a concept of their employ ment to deprive people of their constitutionally protected conduct thru assorted ploys, notwithstanding this courts finding that police must obey the law (Spano v N.Y. 360 US 132, 156) and the New York finding that the administration must be beyond suspicion of reproach (Peo. v Savvides, 154 NY2d 136).

The ploys of police are the subject of constant petitions to this court. Police ploys and failure for people to prevail over them in court can be found in N.Y. Peo. v McMurty and the federal 1967 The Police Task Force Report which also contains the statement that "If

citizens show disrespect for an officer, such conduct, alone, while reprehensible, dosenot justify making or taking other action" (p180). "THE POLICE" fails to explain why police engaging in the practices should be afforded respect.

2. The thrust of the case law in the United States is that people must suffer any damage police care to cause and then collect damages. If a remedy is that which must be obtained thru a legal proceeding on an individual basis, the remedy is that governed by less then chance and waste. The Texas Sam Huston years ago made the observation that a person should suffer any then to go to court. The same reasons apply which seem to be inherent to any court system. Courts function best as an instrument of damage. One large scale example is failure of courts

to protect the rights of jail inmates. jail upheavals seem to follow inmates court case being dismissed without relief. The reason for that is not that those that believe the unbelieveable will do bad things to others, but that of our side vs. the other side. That is the common thread found in the courts in this country, whether criminal or civil as an example the milking of estates of deceased with the bottom line of judicial approval. Injunctions for jails must be with a court appointed overseer or the inmates must be forever going to court to inforce it whether Jacksonville (FL), Duchess County (NY) or any place else. The thought is that government agents should be guided by their conscience.

3. This is a case where a civil case

in the past resulted in a jury finding of no cause of action upon a good faith defence. There clearly is no remedy against wrongful police conduct of which there is clear evidence in this csse. There must be deemed that the police of Messena do not know that police can not require a person to answer questions or to supply identification, and that they will continue to ingage in such prohibited conduct. If on going illegal acts of police do not result in recovery of damage as a result of oourt rules, a court should not find res judicata as a bar to equitable relief as to futher acts.

It is a matter of settled law that police can not require a suspect of any kind to answer any question or should be charge for failure to answer any question, that police refuse to understand.

4. Any injunction must by its nature apply to all people, for if this petitioner must supply identification to assurt constitutionals rights then there would be in effect a court order to give up a right to assurt a right. Such a notion fails to uphold the constitution. The problems of Ms. Mapp shows hasards.

5. There are no serious reasons as to why the Massena police should not be barred from questioning anyone or making an arrest until a court appointed overseer is in place seeing to it that the practice of ignorance of police prohibited conduct is stopped. Should there be any notion that the Massena police can do something that the people around there cannot do for them self, there are N.Y. State police to do those acts which may and may not be lawful, as well as County

sheriff's force and town constable, however for such a conclusion there should be a finding that police are a different kind of people then found in the general population of Massena.

6. Notwithstanding settled case law, for all practical purpuse constutional rights are so elusive that they are in substance a matter of discretion, which clearly fall within the denial of equal rights, protection and treatment supported by federal and state courts. That is "law and order" is an opposite code.

C O N C L U S I O N

A writ of certiorary should issue to review the order of the second circuit U.S. Court Court of Appeals.

Submitted by,

Donald Schanbarger

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF NEW YORK

DONALD SCHANBARGER,

Plaintiff,

-against- 79-CV-803

POLICE CHIEF OF THE VILLAGE OF MASSENA, NEW YORK, Dale Wright,

Defendant.

APPEARANCES: OF COUNSEL:

DONALD SCHANBARGER

Pro Se

Salem, New York 12865

CARTER, CONBOY, BARDWELL, DIANE BRESEE

CASE & BLACKMORE

Attorneys for Defendant

40 Steuben Street

Albany, New York 12207

JAMES T. FOLEY, D. J.

MEMORANDUM-DECISION and ORDER

Plaintiff, a persistent civil rights litigant in this Court, filed a pro se complaint of 28 allegations, paying the filing and service of process fees. The named single defendant is the police chief of the Village of Massena, and jurisdiction is based upon 42 U.S.C. Sec. 1983 and 28 U.S.C. Sec. 1343, statutes often invoked for pro se claims of the plaintiff. The defendant moves to dismiss the complaint for failure to state a claim for which relief can be granted.

In the present complaint, plaintiff seeks only specific equitable relief, but such relief is of an extreme and extraordinary nature. It is for a "prohibition or injunction" order that would enjoin members of the police department of Massena under the defendant from stop-

ping, questioning and arresting "anyone" on its public streets. The limitations sought in this respect are detailed, with the exceptional restraint that the defendant and the police officers be enjoined from any arrest until a person appointed by this court is empowered to direct and supervise the defendant in the discharge of his duties in this respect.

Plaintiff had his own actual involvement with the questioning and arrest procedures of the Massena police department. He sued pro se in this court for eleven million dollars punitive and eleven million dollars compensatory damages for unconstitutional violation and deprivation alleged to have occurred during his questioning and arrest in Massena. Schanbarger v. Dale Wright & The Village of Massena, New York, 78-CV-

20, N.D.N.Y.

The case was consolidated for trial with another Schanbarger case, 78-CV-27, and was tried for five trial days before District Judge Lloyd F. MacMahon in Auburn, New York. The plaintiff tried it himself, and the defendants were represented by an eminent trial attorney. The judgment was one of No Cause of Action.

The plaintiff now seeks to protect the general public from the unconstitutional experience he still claims to have suffered on the streets of Massena. No matter the great liberality the Court of Appeals, Second Circuit, requires for the treatment of pro se civil rights complaints, it does not seem that policy would allow the filing of money damages claims first, and then if unsuccessful a

followw-up claim for equitable relief. See Escalera v. New York City Housing Authority, 425 F.2d 853, 857 (2d Cir.), cert. denied, 400 U.S. 853 (1970); see Heimbach v. Village of Lyons, 597 F.2d 344, 346 (2d Cir. 1979). Common sense and judgment should be allowed to enter to some degree in the analysis and perception of the constitutional validity of such claim that in many instances may be discerned from the reading of the complaint.

There are a number of reasons that support the dismissal of this complaint. The doctrine of res judicata is fully applicable in actions brought under 42 U.S.C. Sec. 1983. Preiser v. Rodriguez, 411 U.S. 475, 497 (1973). Delicate and serious quesbions as to whether any injuctions should issue from a federal

court restraining police from conduct that might be lawful. Allee v. Medrano, 416 U.S. 802, 813-816 (1974). Equitable restraint doctrine of Federal courts applies. Younger v. Harris, 401 U.S. 37 (1971); Huffman v. Pursue, Ltd., 420 U.S. 592 (1975). Finally, and most important, plaintiff has no standing under established federal principles. Warth v. Seldin, 422 U.S. 490, 498-502 (1975); Simon v. Eastern Ky. Welfare Rights Org., 426 U.S. 26 (1976); Duke Power Co. v. Carolina Env. Study Group, 438 U.S. 59, 78-81 (1978).

The motion is granted and the motion is dismissed.

It is so Ordered.

Dated: February 21, 1980

Albany, New York

/s/ James T. Foley

UNITED STATES DISTRICT JUDGE

N.B. Since this statement does not constitute a formal opinion of this court and is not uniformly available to all parties, it shall not be reported, cited or otherwise used in unrelated cases before this or any other court.

UNITED STATES COURT OF APPEALS

for the SECOND CIRCUIT Cal #74

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Court House, in the City of New York, on the 18th of September, one thousand nine hundred and eighty.

Present:

HONORABLE WILFRED FEINBERG

Chief Judge

HONORABLE J. EDWARD LUMBARD

HONORABLE JAMES L. OAKES

Circuit Judges

UNITED STATES COURT OF APPEALS

FILED SEP 18 1980

A. DANIEL FUSARO, CLERK

SECOND CIRCUIT

DONALD SCHANBARGER,

Plaintiff-Appellant,

- against - 80-7276

DALE WRIGHT, POLICE CHIEF OF THE VILLAGE OF MASSENZ, NEW YORK,

Defendant-Appellee,

Appeal from the United States District Court for the Northern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Northern District of New York, and was submitted by appellant pro se and by counsel for

appellee.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged and decreed that the judgment of said District Court be and it hereby is AFFIRMED on the opinion of Judge Foley, dated February 21, 1980.

/s/ Wilfred Feinberg
WILFRED FEINBERG, Chief Judge

/s/ J. Edward Lumbard
J. EDWARD LUMBARD

/s/ James L. Oakes
JAMES L. OAKES

Circuit Judges

No. 80-1330

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CLERK

Supreme Court of the United States

October Term, 1980

DONALD SCHANBARGER,

Petitioner,

-against-

POLICE CHIEF OF THE VILLAGE OF MASSENA, NEW YORK, Dale Wright,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS OF THE SECOND CIRCUIT

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No. 80-1330

Supreme Court of the United States

October Term, 1980

DONALD SCHANBARGER,

Petitioner,

-against-

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Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS OF THE SECOND CIRCUIT

CARTER, CONBOY, BARDWELL, CASE & BLACKMORE
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EUGENE E. NAPIERSKI
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Statement of the Case

On October 31, 1977, at 2:00 in the morning, the plaintiff, Donald Schanbarger, was walking on a sidewalk adjacent to Main Street in the Village of Massena, New York. He was wearing a hooded jacket with the hood over a portion of his head. He was stopped and questioned by two uniformed Massena police officers, Harold Terry and Michael Kroeger. The plaintiff refused to give his name, a reason for his presence, or any other information.

Several hours earlier, the officers had received a teletype message stating that a certain certified mental patient, Thomas Myers, had been missing from the St. Lawrence State Hospital since 8:00 p.m. of the previous day. This hospital is less than 40 miles from the Village of Massena. The message was an all-point bulletin directed to the police departments in the areas and contained a physical description of the missing patient. The message also stated that the patient had homocidal and suicidal tendencies.

The physical description of the missing mental patient closely fit the description of Mr. Schanbarger. The similarity in the physical description of the two men, together with the lateness of the hour and the fact that Mr. Schanbarger was wearing a jacket with a hood which covered a portion of his head, prompted the officers to stop him and ask him his name, address, and an explanation of his conduct.

Upon being asked his name by the officers, Mr. Schanbarger refused to answer and, indeed, refused at first to stop walking. The officers believed that he was behaving evasively and irrationally. This, together with all the other facts and circumstances, prompted the officers to detain Mr. Schanbarger by bringing him to their headquarters. Mr. Schanbarger was charged with obstructing governmental administration (Penal Law §195.05). Later that morning, after having learned that the escaped mental patient had been found, this charge was dismissed and the plaintiff left the police station without the police officers learning his name or any other information which would identify him.

As a result of this incident, Mr. Schanbarger commenced an action in United States District Court seeking a total of Twenty-Two Million Dollars in damages for what he alleged to be an unconstitutional violation and deprivation of his rights. This action was tried in June of 1979, and after a full trial on the merits covering a span of five days, the jury returned a verdict of no cause of action.

Having been unsuccessful on his claim for money damages, Mr. Schanbarger commenced the present action on December 5, 1979. In his complaint, Mr. Schanbarger seeks various items of equitable relief against the defendant in the nature of orders of injuction and prohibitions restraining and prohibiting said defendant and more particularly, members of the defendant's police department from doing certain things in connection with its functioning as a police department. As part of the relief sought, Mr. Schanbarger asks that the defendant and members of his department, be enjoined from any arrest until someone is appointed by the United States District Court to supervise the defendant, Police Chief, in the discharge of such duties.

On February 4, 1980, the defendant brought on a motion to dismiss the above complaint for failure to state a claim upon which relief can be granted. Upon submission of papers from both parties, and after due deliberation, Judge James T. Foley issued a written decision on February 21, 1980, granting the defendant's motion and dismissing the complaint.

Plaintiff took an appeal from this Judgment and on September 18, 1980, the United States Court of Appeals for the Second Circuit unanimously affirmed the Judgment of the District Court on the opinion of Judge Foley (App. 7-9).

SUMMARY OF AGRUMENT

The District Court properly dismissed the Plaintiff's complaint in view of the fact that the Plaintiff lacked the requisite standing and in view of the fact that the doctrines of res judicata and equitable restraint precluded the court from granting the relief which the Plaintiff sought in his complaint.

Argument

A party seeking injunctive relief must demonstrate to the Court that acts are presently being committed which will result in his irreparable injury. Past exposure to alleged unconstitutional practices does not show a present case or controversy regarding injunctive relief, when unaccompanied by any continuing, present adverse effects. *Rizzo v. Goode,* 423 U.S. 362 (1976). In order to warrant invocation of federal court jurisdiction and to justify exercise of the Court's remedial powers on his behalf, the plaintiff is absolutely required to set forth the existence of a case or controversy between himself and the defendant within the meaning of Article III §2 of the United States Constitution, *Warth v. Seldin,* 422 U.S. 490 (1975). It is respectfully submitted that a review of Mr. Schanbarger's complaint establishes that the plaintiff has totally failed to meet the Article III requirement and thus is without standing to invoke federal court jurisdiction.

A careful reading of the plaintiff's complaint clearly shows the absence of any allegation that the defendant is presently committing or threatening to commit any actions against the plaintiff. Indeed, the sole basis for Mr. Schanbarger's claim for equitable relief is a single incident which occurred back in October of 1977 and which is set forth in detail in the statement of facts portion of this brief. Under the law as enunciated by the United States Supreme Court in *Rizzo, supra,* a single incident which occurred over two and on-half years ago does not set forth a justiciable controversy supporting a claim for equitable relief. The issue of justiciability is the threshold question in every federal case, determining the power of the court to entertain the suit. *Warth v. Seldin, supra.* In view of the plaintiff's failure to allege facts sufficient to meet this threshold requirement, the District Court had no choice but to dismiss Mr. Schanbarger's complaint.

In addition to the plaintiff's lack of standing, there are a number of other reasons which mandated the District Court's dismissal of this complaint. As Judge Foley indicated in his decision (App. 1-6), the doctrine of res judicata is fully applicable in actions brought under 42 USC §1983, citing *Preiser v. Rodriguiz,* 411 US 475, 497 (1973). As pointed out in the statement of facts, Mr. Schanbarger

had a full and fair opportunity to litigate the issue of whether the police officers' conduct was reasonable and proper. The same issue forms the basis of his current action. It was his decision to seek redress in the form of an action for money damages. Having been unsuccessful in this endeavor, he is now attempting to pursue a claim for equitable relief. Mr. Schanbarger has had his day in Court. To allow him to pursue a claim in equity would be to work an undue hardship on the defendant. It is respectfully submitted that the policy underlying the doctrine of res judicata precludes the plaintiff from bringing this follow-up claim for equitable relief.

Judge Foley, in dismissing Mr. Schanbarger's complaint, also found that serious questions exist concerning the propriety of a federal court enjoining police from conduct that might be lawful (App. 1-6); citing *Allee v. Medrano*, 416 US 302, 813-816 (1974) (App. 1-6). He also held the doctrine of equitable restraint to be applicable (App. 1-6), citing *Younger v. Harris*, 401 US 37 (1971) and *Hoffman v. Pursue, Ltd.*, 420 US 592 (1975). An injunction is an extraordinary remedy which should be exercised sparingly and with utmost caution. This settled rule of law becomes particularly true when the federal courts are asked to enjoin the activity of a local governmental entity. Important considerations of federalism are additional factors which weigh against any such action. Federal Courts must be constantly mindful of the "special delicacy of the adjustment to be preserved between federal equitable power and State administration of its own law." *Rizzo v. Goode, supra; O'Shea v. Littleton*, 414 US 488 (1974); *Stefanelli v. Minard*, 342 US 117 (1951).

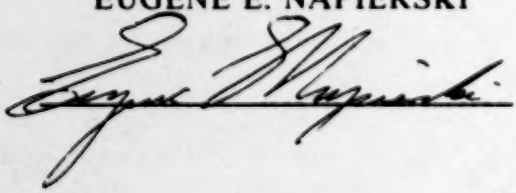
The United States Supreme Court in *Rizzo*, further held that where, as in the instant action, injunctive relief is sought against those in charge of a local government entity, the principles of equity militate heavily against the grant of an injunctive except under the most extraordinary of circumstances. The Court in *Rizzo* quoted the previous decision in *O'Shea v. Littleton, supra*, which stated that "a major continuing intrusion of the equitable power of the federal courts into the daily conduct of state criminal proceedings is in sharp conflict with the principles of equitable restraint . . . " and held that the above principle is equally applicable where the intrusion involves the activity of a local government entity.

Clearly the conduct which forms the basis of Mr. Schanbarger's complaint cannot be found to constitute "most extraordinary circumstances" as envisioned by the Supreme Court in *Rizzo*. Police officers have the responsibility for the protection of the lives and property of our citizens. On the morning of October 31, 1977, under all of the above-mentioned circumstances, the officers reasonably and in good faith detained Mr. Schanbarger. In fact, had they not done so, they would have been remiss in their duties. It should be noted that this detention which forms the basis for Mr. Schanbarger's claim for equitable relief could easily have been avoided had Mr. Schanbarger simply provided the officers with his name and a brief explanation of his presence. Despite all of the foregoings, Mr. Schanbarger is asking this Court to in effect assume control and supervision of the Village of Massena police force. It is respectfully submitted that such judicial intervention is in direct conflict with the pronouncements of the Supreme Court regarding federal equitable restraint, and accordingly, upon this ground, as well as those previously discussed, the plaintiff has failed to state a claim upon which relief can be granted.

CONCLUSION

The Petition for Writ of Certiorari should be denied.

EUGENE E. NAPIERSKI



Dated: Albany, New York
March, 1981